Nos. 77-420, 77-421, and 77-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE C INC., UNITED STATES OF AMERICA, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Respondent Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App.2a-30a) [1] is not yet reported. The decision of the Federal

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[1] "Pet.App." refers to "Petitioner's Appendix" of the Federal Communications Commission in No. 77-436.

Communications Commission (Pet.App.32a-168a) is reported at 60 F.C.C.2d 25 (1976).

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1977 (Pet.App. 2a). Motions to stay the issuance of the mandate were granted by the Court of Appeals on August 22, 1977. The petitions in Nos. 77-420 and 77-421 were filed on September 16, 1977. The petition in No. 77-436 was filed on September 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether restrictions on the services which may be offered by a communications carrier may be implied, where the Federal Communications Commission has granted a certificate of public convenience and necessity to the carrier for the construction and operation of communications facilities under Section 214 of the Communications Act without express conditions, and without an affirmative finding under Section 214 that the public convenience and necessity require the imposition of terms and conditions on the certificate.

STATUTE INVOLVED

Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, provides in pertinent part:

> Sec. 214. (a) No carrier shall undertake the construction of a new line or any extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the

> present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.
>
> (c) The Commission shall have power to issue such certificate as applied for, or refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

In 1969, the Federal Communications Commission granted applications by Microwave Communications, Inc. (MCI) to construct microwave facilities between Chicago and St. Louis "to offer to its subscribers a limited common carrier microwave radio service designed to meet the interoffice and interplant communications needs of small businesses".[2] No express conditions on the services which could be offered by MCI were stated in the certificate of public convenience and necessity issued to MCI at that time, or in later certificates. In 1971, the Commission granted applications by MCI to improve its facilities, observing that while MCI's services would meet the unfulfilled needs of small businesses, the Commission did not intend to confine the services which could be offered by MCI to customers having "only limited needs" for microwave services.[3]

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[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953, 960-61 (1969), reconsideration denied, 21 F.C.C.2d 190, 194 (1970).

[3] *Microwave Communications, Inc.*, 27 F.C.C.2d 380, 383 (1971).

Following MCI's grant, numerous applications were filed by MCI and its affiliated companies, and by Southern Pacific Communications Company (SPCC) and others, to construct microwave facilities to provide specialized communications services in various parts of the country. After an extensive rule making proceeding in *Specialized Common Carrier Services,* the Commission concluded that a general policy in favor of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.[4] Thereafter, the Commission dismissed a rule making proceeding which would have required prior approval from the Commission before a carrier could offer new or revised services over its authorized facilities.[5]

Under tariff revisions which became effective on October 10, 1974, MCI offered a new "metered use" service over its authorized facilities which it called "Execunet". The American Telephone and Telegraph Company (AT&T) complained to the Commission that MCI was offering ordinary long distance telephone service, called Message Telecommunications Service (MTS), under the guise of Execunet, and that MCI was only authorized to provide private line services to its customers.

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[4] *Specialized Common Carrier Services,* Docket No. 18920, 29 F.C.C.2d 870, 920 (1971), recon. denied, 31 F.C.C.2d 1106 (1971), affirmed, *Washington Utilities & Transportation Commission* v. *FCC,* 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC,* 423 U.S. 836 (1975).

[5] *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities,* Docket No. 19117, 39 F.C.C.2d 131 (1973).

The Commission rejected the Execunet tariff as unlawful. The Commission ruled that "[o]ur discussion in the *Specialized Common Carrier* decision makes it quite clear that we intended and did open competition only in the limited portion of AT&T's and Western Union's business represented by private line services",[6] and that Execunet had many characteristics similar to those of MTS, and not to any actual private line service being offered by any carrier.[7]

In a unanimous decision here under review, the District of Columbia Circuit reversed.[8] The Court of Appeals rejected the Commission's position that there were implicit restrictions on the facilities authorizations of specialized carriers which limited them to providing only "private line" services. It noted that the Commission's interpretation represented a substantial departure from its prior administrative practice, when it wished to impose limitations, of writing restrictions into a carrier's certification or prescribing by rule the services to be rendered by a class of stations.[9]

The Court of Appeals held that under the express terms of Section 214(c) of the Communications Act, the Commission *may* attach restrictions, or require prior approval for services to be provided over authorized facilities, but only after it has made an affirm-

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[6] *MCI Telecommunications Corp.,* 60 F.C.C.2d 25, 36 (1976), Pet. App. 32a, at 51a.

[7] Id., 60 F.C.C.2d at 42, Pet. App. at 61a.

[8] *MCI Telecommunications Corp.* v. *FCC,* No. 76-1635 (D.C. Cir. July 28, 1977), Pet. App. 2a.

[9] Id., Pet. App. at 16a-17a.

ative determination that "in its judgment the public convenience and necessity * * * require" terms and conditions to be attached to the certificate.[10] It ruled that the *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination restricting specialized carriers to private line services,[11] nor did the Commission make a determination at any time that the public interest would be served by creating or perpetuating an AT&T monopoly in interstate MTS to justify restrictions on specialized carrier competition.[12] Accordingly, it was held, since no prior approval for new services to be carried on authorized facilities was required, the Commission could not reject Execunet for not having been given prior approval.[13]

ARGUMENT

1. The Decision of the Court of Appeals Is Not in Conflict With Decisions of Other Courts of Appeals.

This case presents (1) a narrow question of statutory interpretation, i.e., whether Section 214 of the Communications Act permits the Commission to impose restrictions by implication on a carrier's certificate of public convenience and necessity without an affirmative finding that the restrictions are required, and (2) a narrow question of fact, i.e., whether the

[10] Note 8 supra, Pet. App. at 20a-24a.

[11] Id., Pet. App. at 28a.

[12] Id., Pet. App. at 29a-30a.

[13] Id., Pet. App. at 30a-31a.

Commission has done so by restricting specialized carriers to private line services.

This is the first court decision to address those issues. In holding that the implied restrictions may not be and have not been imposed, the Court of Appeals followed established precedents of Courts of Appeals in Commission cases that unless the regulatory agency has promulgated rules setting out limitations on services to be offered over the authorized facilities,[14] or has made an affirmative determination that the public convenience and necessity require the imposition of restrictions,[15] it may not interfere with the right of a carrier to initiate tariffs proposing new services or rates.[16]

There is no inconsistency with the series of recent decisions in which various Courts of Appeals have uniformly affirmed Commission decisions *extending* competition by new entrants in services and facilities heretofore offered only by the telephone companies.[17]

[14] *Press Wireless, Inc.*, 25 F.C.C. 1466 (1958), affirmed, *Press Wireless, Inc.* v. *FCC*, 105 U.S. App. D.C. 86, 264 F.2d 372 (1959).

[15] *Western Union Telegraph Co.* v. *FCC*, 541 F.2d 346, 355 (3rd Cir. 1976).

[16] *United Telegraph Workers, AFL-CIO* v. *FCC*, 141 U.S. App. D.C. 190, 436 F.2d 920 (1970); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973). Cf. *Public Utilities Commission of California* v. *United States*, 356 F.2d 236 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966).

[17] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975); *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 797 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3190 (Oct. 3, 1977); *Bell Telephone Co. of Penn-*

Not one Court in its holdings imposed any restrictions on the services and facilities which could be offered, but rather each Court rejected challenges by AT&T and others to competition in the specific area under inquiry.

Not one Court has ruled on the issues decided by the Court of Appeals below, whether restrictions can be or have been imposed by implication. In *Washington Utilities & Transportation Commission* v. *FCC* [18] cited by petitioners, the Ninth Circuit addressed different questions of procedure, i.e., whether the Commission's decision to permit the entry of new carriers in the specialized communications field was reasonable and supported by appropriate findings on the record, and subject to resolution by rule making. In *Bell Telephone Co. of Pennsylvania* v. *FCC*,[19] also cited by petitioners, the Third Circuit held that FX and CCSA were within the category of private line services clearly open to specialized carriers; it did not reach the question whether FX and CCSA could be furnished if they were not classified as private line.

The Commission suggests [20] that the District of Columbia's decision is inconsistent with the holding of the Third Circuit in *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975); *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *People of State of California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977), petition for cert. pending, No. 77-406 (S.Ct.). Cf. *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[18] Ibid.

[19] Ibid.

[20] FCC petition at 22.

sylvania that the Commission is the appropriate agency, by statute as well as by experience, to decide whether competition should be authorized and to what extent. To the contrary, the thrust of the decision of the Court of Appeals below is fully in conformity with the Third Circuit decision in ruling that the Commission should proceed to make that decision by an affirmative determination under its statutory mandate.

2. The Court of Appeals Decision Is A Proper Construction Of The Governing Statute.

The express command of Section 214(c) of the Communications Act [21] is that the Commission

> may attach to the issuance of a certificate such terms and conditions as in its judgment the public convenience and necessity may require.

It is unchallenged that the Commission has never made a specific affirmative determination under the statute that the public convenience and necessity require that specialized carriers be restricted to private line services. The Commission itself concedes [22] that the established telephone companies have a *de facto* monopoly in MTS, but it has never granted AT&T a *de jure* monopoly. No record has ever been made before the Commission to demonstrate *why* restrictions should be imposed on the specialized carriers in order to protect a monopoly which the Commission has never adjudicated to be proper.

[21] 47 U.S.C. 214(c).

[22] FCC petition at 18 fn. 34.

Significantly, none of the petitioners even adverts to the Commission's proceeding in Docket No. 19117,[23] although this was an important consideration in the decision by the Court of Appeals below.[24] As the Circuit Court points out, the Commission there recognized that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff. In the proceeding, the Commission clearly indicated its understanding of Section 214 as requiring explicit action in order to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines. In terminating the proceeding, the Commission determined not to require its prior approval as a condition for any new service by a carrier over its authorized facilities.

3. A Review By This Court of the Decision of the Court of Appeals Would At Best Be Premature At This Time.

The ultimate issue remaining for decision by the Commission is one which it has never properly considered and resolved, viz., how much *further* does and should competition in communications services extend. The decision of the Court of Appeals below has not resolved this issue. It has made no ruling on the lawfulness of Execunet, or of the AT&T monopoly in MTS services, or on the proper dividing line, if any, which may be drawn between MTS and private line services, or between authorized and non-authorized

[23] Note 5 supra.

[24] Note 8 supra, Pet. App. at 16a-17a.

services. All these matters are left for the Commission to decide. Indeed, the Court of Appeals has expressly noted:[25]

> In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to conduct these proceedings.

The compass of the Court of Appeals' ruling is thus too narrow to justify present review by this Court. The decision below only calls upon the Commission to conduct appropriate proceedings and to reach public interest determinations before it imposes restrictions upon the authorized facilities of specialized carriers. The Commission has not yet conducted these proceedings. For this Court to grant review at this time would affect the merits of the Commission's determination of the issues, before the Commission has had an opportunity to make an informed decision upon a proper administrative record. Until there has been a disciplined examination in an appropriate proceeding of the extent, if any, to which competition should be circumscribed under public interest standards, based upon a specific factual record and not unsupported assumptions and vague suppositions, the issues are not properly ripe for review by this Court.

4. There Are No Special and Important Reasons For A Review On Writ of Certiorari.

The petitions present no constitutional issue, or important question of federal law which should be set-

[25] Note 8 supra, Pet. App. at 30a.

tled by the Court at this time, or any occasion for an exercise of this Court's power of supervision. The matter before the Court of Appeals below involved a narrow question of statutory interpretation and administrative procedure, i.e., whether the agency below was required to make an affirmative determination (as the language of the statute explicitly dictates) that "in its judgment the public convenience and necessity * * * require" that terms and conditions be attached to an otherwise unqualified certificate of public convenience and necessity. The Court of Appeals specifically reached no resolution on the propriety of the tariff offering rejected by the the Commission. Rather, it remanded the question for decision by the Commission in an appropriate proceeding, whether restrictions should be imposed on the authorizations of specialized carriers which presently contain no express conditions. These are matters properly left for the Commission to consider, subject to judicial review under accepted judicial standards.

Contrary to the assertions of petitioners, the decision of the Court of Appeals will have only a minimal effect if permitted to become fully effective. The existing Section 214 authorizations of specialized carriers are restricted as to the lines or routes on which services may be offered, and the number of circuits on each route. Any expansion of MCI's presently limited authorizations will require Sectson 214 applications to the Commission subject to the Commission's processing procedures and its review of certification policies. Other specialized carriers such as SPCC are even more restricted, because they do not have tariffs in effect which permit them to offer Execunet-type service, and the tariffs which must be filed to offer this

or any new service are subject to the notice requirements and the suspension and investigation powers of the Commission before they can become effective. In addition, the specialized carriers with their limited facilities have continuing obligations to their present customers which do not permit them to change substantially the character of the services they are now offering on their authorized facilities.

Thus, the projections of injury by the telephone companies and their supporters are conjectual and unrealistic. Consistently over the years, they have claimed that competition would have a severe effect on telephone revenues and upon the funds available in the interstate revenues pool to support local exchange service. The Commission itself has never found any significant adverse effect on telephone company revenues or on the rates for basic telephone services as a result of competition.[26] In this regard, the Fourth Circuit has said:[27]

> [P]etitioners cannot create an economic impact with the volume of their jeremiad. Their claims of economic impact are refrains of assertions that the FCC has consistently found to be unsubstantiated by evidence, conclusory, and based on unrealistic assumptions about market behavior. [Citations.]

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[26] *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, Docket No. 20003, 61 F.C.C.2d 766, 776 (1976).

[27] *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036, 1055-56 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3190 (Oct. 3, 1977).

Conversely, if review is granted, the specialized carriers will continue to be deprived of the opportunity to offer services to the public which the Court of Appeals has ruled to be permissible under existing authorizations. They will thus continue to be sharply circumscribed in their ability to provide a viable operation and new and innovative services in competition with the established carriers.

In sum, no valid, much less urgent or compelling, reason has been shown for granting the writ. The alleged conflict between Circuits simply does not exist. In addition, as right as was the District of Columbia Circuit's interpretation of the applicable statute and the Commission's procedures, a review of that decision would at best be premature at this time, since the effect of that decision will depend upon its implementation by the Commission.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Respondent

Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel

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